Supreme Court, U.S.
FILED
OCT 6 1993

No. 93-353

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FELTON HALE AND RICHARD S. BERRY,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.
and
JOHN LEROY FULLER, *et al.*,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

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October 6, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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1. Respondents suggest that the decision below does not conflict with the decision of the Second Circuit in *Carter* v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), or with the decision of the Fifth Circuit in *Watson* v. *Graves*, 909 F.2d 1549 (5th Cir. 1990), because a "close reading" reveals certain factual discrepancies between these two cases and the ruling below. Opp. at 1. The discrepancies respondents identify, however, are entirely irrelevant to the doctrinal division the decision below creates.

a. The central factual distinction upon which respondents rely is that the prisoners in *Carter* and *Watson* worked outside the prison for outside contractors. Opp. at 1-2. In *Carter* and *Watson*, however, the analysis of the courts did not turn on where the inmates worked or on the private public status of the alleged employer. Instead, these courts "look[ed] to the purposes behind the [FLSA]." *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 13. Noting that one of these purposes is "to eliminate unfair competition," the courts reasoned that "status as an inmate does not foreclose inquiry into FLSA coverage" because goods and services produced with under-priced inmate labor can have unfair competitive effects. *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 13. The courts therefore held that, "in order to determine the true 'economic reality' of the Inmates' employee status, we must apply the four factors of the economic realities test to the facts in the instant case in light of the policies behind FLSA." *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 14 ("[a] full inquiry into the true economic reality is necessary").

Whatever "pains" the Ninth Circuit took below "not to create at conflict" (Opp. at 1), its decision cannot be reconciled with *Carter* and *Watson*. While the Second and Fifth Circuits expressly held that the economic realities test must be applied to determine the employee status of inmates, the Ninth Circuit joined the Seventh Circuit in holding that the test is "not a useful framework in the case of prisoners who work for a prison-structured program." Pet. App. at 14a. And where the Second and Fifth Circuits found Congress' desire to eliminate unfair competition central to determining the applicability of the FLSA to inmates, the Ninth Circuit expressly rejected this rationale. Instead, it stated that (Pet. App. at 20a):

> while the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition, nothing in the FLSA indi-

cates that that fact alone should convert the relationship between prison and prisoner to one of employer-employee such that prisoners working on a program structured by the prison are entitled to a minimum wage.

Not only is the factual distinction respondents draw irrelevant to the rationale of *Carter* and *Watson*, it lacks any basis in the FLSA itself. Respondents assert that "there is a great difference between prisoners working for outside employers and prisoners who work for prison industries within the fabric of a state prison system." Opp. at 1-2. But they point to nothing in the language, structure, purpose, or history of the Act that indicates that this "great difference" has any bearing on the proper application of the Act.

As petitioners demonstrated, the Act's operative provisions are strikingly broad and do not distinguish between prisons and other types of employers, or between inmates who work in "prison structured programs" and other employees engaged in interstate commerce. Pet. at 16. Moreover, as the Second and Fifth Circuits have recognized, one of the Act's central aims—preventing unfair competition—is directly affected by goods that are produced with cheap inmate labor and sold in interstate commerce. Indeed, while respondents go out of their way to point out that Arizona inmates who staffed reservation centers for Best Western International and Trans World Airlines were paid the minimum wage (Opp. at 6-8), this fact simply highlights the irrationality of the lines the State has drawn. A host of ARCOR programs affect interstate commerce, yet the payment of minimum wages to the prisoners who work in these programs turns on the economically meaningless fortuity of whether the employer is the prison (or, as in the case of the IOBE program, a fellow prisoner) or a third party.[1]

[1] In fact, while the State now champions this distinction, it took precisely the opposite position two years ago in *Gilbreath* v. *Cutter*

b. Respondents also argue that the decision below creates no conflict because neither the Second nor Fifth Circuit discussed the impact of the Ashurst-Sumners Act. Opp. at 2. Rather than undermine the existence of a division among the circuits, however, this fact confirms its existence: while two circuits have concluded that the FLSA applies to inmates who produce goods or supply services in interstate commerce because the FLSA was enacted to prevent unfair competition, three others have concluded that this congressional concern with unfair competition is irrelevant and that the FLSA is therefore inapplicable. Respondents' implicit suggestion that the Second and Fifth Circuits would reverse themselves if they now explicitly considered the impact of a statute that was extant when they rendered their decisions is entirely unwarranted and provides no basis for denying review.

Moreover, respondents' suggestion rests on the manifestly incorrect assertion that applying the FLSA to prisoners who produce goods in interstate commerce "cannot be reconciled" with the "paramount purpose" of Ashurst-Sumners. Opp. at 3. As petitioners and the dissenters below have demonstrated, the two laws are not mutually exclusive but supplementary. Pet. at 17-18; Pet. App. at 36a-39a. Indeed, respondents' contention that Ashurst-Sumners precludes application of the FLSA to inmates in ARCOR programs is astonishing in light of respondents' tacit admission that at least some of those programs violate Ashurst-Sumners.[2] That admission completely belies

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Biological, Inc., 931 F.2d 1320 (9th Cir. 1991), where it argued that inmates working for an outside contractor were not employees because they worked within the prison walls.

[2] After noting that Arizona received a certificate of compliance under 18 U.S.C. § 1761(c), respondents state that "[m]any of Arizona['s] inmates were paid above the minimum wage *when working for private entities.*" Opp. at 5 (emphasis added). The clear implication of this carefully phrased statement is that at least some inmates working for private entities are not paid mini-

the Ninth Circuit's suggestion that "Congress's concern with unfair competition in the FLSA will not be subverted by declining to apply its minimum wage standards to convict labor in prison-structured programs." Pet. App. at 22a. That congressional goal has been and is continuing to be subverted by the introduction into interstate commerce of ARCOR goods and services produced by unfairly priced prison labor.[3]

In short, the distinctions respondents attempt to draw in no way detract from the existence of a circuit split, but rather highlight the need for doctrinal consistency and uniform application of the FLSA.[4]

2. Respondents also argue that the decision below does not conflict with the Department of Labor's interpretation

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mum wage. In any event, respondents cannot deny that petitioners were not paid minimum wages for work performed in prison industries that produced goods and services sold in interstate commerce.

[3] Respondents attempt to confuse matters by noting that payment of minimum wages to petitioners would not necessarily cure the State's violation of Ashurst-Sumners. Opp. at 6. But that fact is irrelevant to whether the existence of Ashurst-Sumners obviates the FLSA's concern with unfair competition.

[4] Respondents also note that the inmates in *Watson* had not been sentenced to hard labor and were instead on work release. Opp. at 1. But the Fifth Circuit's observation that "when a prisoner is sentenced to labor as part of his sentence, his labor belongs to the prison and is at the disposal of the prison officials" (*Watson*, 909 F.2d at 1553 n.7), is simply an acknowledgement that, as petitioners have always recognized, work performed in and for the prison that does not affect interstate commerce falls outside the purview of the FLSA. Pet. at 3; *see also Miller* v. *Dukakis*, 961 F.2d 7, 9 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992) (inmate employees of prison treatment center not covered "because the Treatment Center does not operate in the marketplace and has no business competitors"). Nowhere did the Fifth Circuit suggest that inmates sentenced to hard labor could never be employees under the Act. In any event, this distinction does not apply to *Carter* and thus does not eliminate the circuit split.

of the FLSA because, like the decisions in *Carter* and *Watson*, the interpretive letters petitioners cite involved inmates who worked for outside contractors. Opp. at 3-5. Again, however, this distinction is irrelevant. Seizing on the fact that petitioners work in prison structured programs pursuant to sentences of hard labor, the Ninth Circuit dispensed altogether with the economic realities test and deemed Congress' concern with unfair competition irrelevant to determining whether inmates are employees under the FLSA. Pet. App. at 15a. By contrast, as the letter of Herbert J. Cohen explains, the Department of Labor believes that, in the case of inmates as with other workers, "the determination of an employment relationship is not based on isolated factors or any *single characteristic*" but instead "depends upon the circumstances of the whole activity," which must be assessed under the "*Bonnette*" or "economic reality test." Pet. App. at 102a (emphasis added; internal quotation marks deleted). Such an examination is required, the Department has explained, to ensure that the FLSA's goal of preventing unfair competition is not frustrated. Pet. App. at 103a. The Department's analysis, which is fundamentally inconsistent with that of the Ninth Circuit, plainly does not hinge on the isolated fact upon which respondents once again choose to focus.

Moreover, as petitioners have demonstrated, the Department of Labor's letters indicate that, again in contrast to the Ninth Circuit, the Department perceives no conflict between the FLSA and Ashurst-Sumners. Pet. at 15. Respondents' suggestion that "the probable reason" for this apparent agency view is that "two of the three decisions concerning the interaction between the two statutes postdated" the letters in question (Opp. at 5) is entirely untenable. The Department is responsible for enforcing both laws. Certainly, it does not look to the decisions of the courts of appeals to be reminded of the statutes it is charged with administering. See 18 U.S.C. § 1761 (re-

quiring Secretary of Labor to submit annual reports to Congress concerning compliance with Ashurst-Sumners Act).

* * * *

Respondents cannot explain away the inter-circuit conflict or interpretive conflict between the judicial and Executive branches concerning the applicability of the FLSA to inmates who produce goods and services in interstate commerce. Nor can respondents refute petitioners' showing that the decision below undermines fair competition—one of the Act's central goals. Accordingly, this case raises an important question of federal law that can and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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